No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,
Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,
Appellees.

OPENING BRIEF OF APPELLANTS

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BENJAMIN H. KIZER,
J. W. GREENOUGH,
Old National Bank Building,
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STATUTES AND TEXTS

I

STATEMENT SHOWING JURISDICTION

Jurisdiction arises out of diversity of citizenship. Appellants are residents and citizens of Oregon and California, appellees of the State of Washington. The amount in controversy exceeds $3,000 exclusive of interest and costs (Findings of Fact 1 and 2, R. 15).

II

STATEMENT OF CASE

Since the trial court has found all of the facts in favor of appellants, we challenge only the conclusion of law deduced therefrom. Therefore, this statement of the case is a compressed narrative of the trial judge's findings which, for convenience of this court, are printed as Appendix 1 to this brief.

For many years Henry Kucks and wife, residents of Davenport, Washington, had been friends of Catharina Schlaadt, mother of appellants. In June 1944 Kucks, having lately lost his wife by death, visited Catharina Schlaadt at her home and there orally made her the proposition that if she would marry him he would leave, upon his death, all of his estate to her two sons, he having no heirs of his own. He made this promise to induce her to marry him (Finding of Fact 4, R. 16).

Mrs. Schlaadt had been a widow for 10 years, lived in a large well furnished home of her own in Portland, Oregon, where she had a wide circle of friends and relatives who visited her frequently, and was happily circumstanced both as to relatives and living conditions. She received devoted attention from her son Grover and wife and had near her in that city her grandson and his wife and her great-grandson (Finding of Fact 3, R. 15).

The court found that this proposition or promise of Kucks "was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise" (Finding of Fact 6, R. 17).

The court further found that the evidence supporting such promise "is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills" hereinafter referred to (Finding of Fact 5, R. 16).

Two months thereafter on August 11, 1944, relying on the promise made to her, Catharina Schlaadt and John Henry Kucks were married and Catharina Schlaadt removed to Davenport, Washington, where John Henry Kucks resided, taking her personal and household belongings with her. There she was a dutiful wife to John Henry Kucks until her death on January 4, 1946 (Findings of Fact 7 and 8, R. 17).

After their marriage John Henry Kucks on May 24, 1945 made his will by which he left all of his property and estate to his "beloved wife, Catharina Kucks," and appointed her to be the executrix thereof under the terms of his non-intervention will (Finding of Fact 9, R. 17).

After the death of his wife, Catharina, John Henry Kucks on February 11, 1946 made a second will by which, after bequeathing $500 in trust for Gary Handel (infant son of George Handel whom Kucks and his wife had brought up to manhood), Kucks left the whole of his estate to appellants, stating that they were the sons of his deceased wife, Catharina, and appointing Grover Schlaadt the executor of this non-intervention will (Finding of Fact 11, R. 18). These are the two wills referred to by the court in its findings as corroborating the evidence of the oral promise of Kucks to leave his estate to the two sons of Catharina Schlaadt (Finding of Fact 5, R. 16). Thereafter, between October 22, 1946 and August 27, 1949 John Henry Kucks executed three other wills in which he first diminished, later omitted altogether, the provision he had directly made for appellants in his will of February 11, 1946 (Findings of Fact 12, 13 and 14, R. 18-19).

Thereafter on July 12, 1951 John Henry Kucks died and his last will of August 27, 1949 was probated whereby he left the whole of his estate to two neighbors, appellees herein, to whom he was not related in any way (Complaint par. 7, R. 5; Answer

par. 6, R. 13; Finding of Fact 15, R. 20). The appraisal of his estate disclosed assets in the State of Washington of the value of $72,552.22, not including a balance of approximately $15,000 due from sale of Canadian lands (Finding of Fact 16, R. 20).

From these findings of fact the court drew the conclusion of law which we challenge by this appeal that the agreement between John Henry Kucks and Catharina Schlaadt was void and unenforceable under the statute of frauds of the State of Washington and that neither the execution of the wills dated May 24, 1945 and February 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

III

SPECIFICATIONS OF ERRORS

1. The court erred in concluding (Conclusion of Law 1, R. 21) that the oral contract between Catharina Schlaadt and John Henry Kucks by the terms of which Kucks agreed to leave his property to appellants in consideration of Catharina Schlaadt's marrying him was void and unenforceable in view of the complete performance of the contract by both parties to it.

2. The court erred in concluding (Conclusion of Law 1, R. 21) that neither the execution of the

wills dated May 24, 1945 and February 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

3. The court erred in concluding (Conclusion of Law 2, R. 21) that defendants (appellees) were entitled to judgment against plaintiffs (appellants) dismissing this action with prejudice and costs.

4. The court erred in entering judgment on the findings in favor of appellees and against appellants.

IV

ARGUMENT

A. Preliminary Statement

Although there are four specifications of error, they raise a single issue of law: Was the performance by both parties of the promise or contract of John Henry Kucks sufficient to take the contract out of the statute of frauds and thus render it enforceable?

1. We consider first the facts upon which appellants rely as evidence of performance of this contract by both parties to it. Certain of these facts isolated and standing alone would not constitute by themselves part performance. Other of the facts do make for part performance. But taken as a whole they show the contract fully performed as follows:

(a) John Henry Kucks made the promise, as the court found, in good faith expecting Catharina to rely on it (Finding of Fact 4, R. 16).

(b) Catharina did rely on it and in the faith that he would so perform did marry him (Finding of Fact 6, R. 17).

(c) To carry out this agreement Catharina gave up the associations with her relatives and longtime friends in Portland and the comfortable home that she owned where she had been contented and happy, dismantled the furniture, furnishings and personal belongings of her home and moved them to Davenport, Washington, to live with Kucks as his dutiful wife until her death. In short, she left nothing unperformed on her part of this contract (Finding of Fact 8, R. 17).

(d) In turn, during her life as his wife Kucks left the whole of his estate to his "beloved wife," Catharina, manifestly wishing to place it in her hands to pass on to her sons should she survive him (Finding of Fact 9, R. 17).

(e) Six weeks after the death of Catharina, Kucks executed a second will leaving all of his property (save $500 in trust to the infant son of the man he and his first wife had raised from childhood) to the two sons of Catharina, just as he had agreed to do. Even the slight deviation of $500 (about 1/180 of his estate) was to go to appellants should the infant son die before reaching 21 years (Finding of Fact 11, R. 18).

Thus we see that Kucks fully performed his part of this contract during the life of Catharina and confirmed that performance after her death. We invite counsel for appellees to think of a single aspect of this contract that remained unperformed by either party to it.

Thereafter, in less than 3 years (from October 22, 1946 to August 27, 1949) Kucks executed three other wills, each quite different from the first two (Findings of Fact 12, 13 and 14, R. 18 & 19). Whether these later wills were the product of a weak and wavering will enfeebled by age (he was 84 to 87 in this period) or were the result of undue persuasion by appellees is not disclosed by the evidence and is not material here. It suffices to note that each will is in partial or complete violation of the terms of his contract with his deceased wife, the making of which has been conclusively established.

2. We recognize that this Court will determine this case in conformity with the statutes and decisions of the State of Washington. For the convenience of this court we include Washington's statutes of wills and frauds as Appendix 2 to this brief.

In considering the Washington decisions on this point we bear in mind that no two cases in this field are alike. In fact the Washington Supreme Court has many times recognized that in this field of law "Each case of the kind now before us must rest upon its own peculiar facts and circumstances."

Jennings v. d'Hooge, 25 Wn. (2d) 702, 706; 172 P. (2d) 189, 191;
In re Fischer's Estate, 196 Wash. 41, 48; 81 P. (2d) 836, 839;
Resor v. Schaefer, 193 Wash. 91, 95; 74 P. (2d) 917, 918;
Avenetti v. Brown, 158 Wash. 517, 521; 291 Pac. 469, 471;
Velikanje v. Dickman, 98 Wash. 584, 586; 168 Pac. 465, 466.

Thus we must examine a number of decisions of the Supreme Court of Washington, each of which has certain aspects similar to the case at bar, and deduce from the whole the applicable basic principles controlling the decision of this case.

B. Basic Principles

The rule of law that part or full performance of an oral contract which has been proved by evidence that is "conclusive, definite, certain and beyond all legitimate controversy" takes such a contract out of the statute of frauds and out of the statutes relating to the execution of wills or deeds is almost as old as the statute of frauds itself and is too well established to require citation of authority as to the existence of the rule.

But the circumstances under which it is held that these statutes do not apply to such oral contracts do call for an examination of the Washington cases on this subject.

A comprehensive appraisal of the decisions to be here considered discloses the following basic principles applicable to this case.

1. Unlike a number of other supreme courts, the Washington decisions disclose a liberal policy as to part performance coupled with an exacting policy as to proof of the oral contract.

2. The Washington decisions place special emphasis on the value of testimony showing that the promisor has executed a will either in full or partial conformity with the oral contract. And where the promisee has performed, though her act of performance amounts to ever so little, our decisions accept this execution of such a will as an *act of performance* which admits proof of an oral contract even when the will was later revoked by the promisor.

3. Where such an oral contract, otherwise void by these statutes, is fully performed on both sides, the Washington decisions hold that the statutes of frauds, including those pertaining to wills and deeds, do not apply.

The facts in this case, as established by the trial court's findings, measure up fully to the requirements of all three of these basic principles. We now turn to the Washington decisions to demonstrate how strongly the facts here adhere to these principles.

1. *Washington Decisions: Liberal as to Part Performance, Exacting as to Proof of an Oral Contract Otherwise Void under Statute of Frauds.*

The recent case of *Jennings v. d'Hooge,* 25 Wn. (2d) 702; 172 P. (2d) 189, relating to an oral contract to make a will, was a close case on the evi-

dence and involved a vigorous dissent. Hence, the majority of the Court undertook to review all of the oral contract cases, 37 in number, that had come before it. Of these, 12 cases had enforced such oral contracts and in 25 cases the Court had denied relief to the plaintiff, finding either that the evidence did not establish the contract with the requisite certainty or that the evidence did not tend to prove that a contract was actually entered into.

This Court will not fail to note that these 38 cases (including *Jennings v. d'Hooge, supra*) almost invariably turn on the inquiry (1) whether the evidence established the existence of a definite contract and (2) whether the proof was "conclusive, definite, certain and beyond legitimate controversy."

These questions are, of course, set at rest in favor of appellants by the findings in this case. The only inquiry with which we are concerned is whether there has been part or full performance of the oral contract admittedly made. We look to the 12 cases in which oral contracts were enforced, therefore, to see what was the part performance on which the Court granted relief. In certain of the cases the part performance was slight. In others it was more substantial. But in all of the cases it was accepted by the Court as adequate. How little it takes to satisfy

the requirement of part performance, if the proof is adequate, is shown by the following cases.

In *Coleman v. Larson,* 49 Wash. 321, 325; 95 Pac. 262, 264, decedent caused a letter to be sent to her brother saying that if the brother and his wife would be willing to make their home with her she would give them that home. The brother and his wife left from California for Seattle and thereafter resided with decedent until her death two months later. Decedent did not fully perform, though she did leave with her executor a deed to plaintiffs covering a portion of the home property. Slight as was this performance by plaintiffs, the evidence of the oral contract being satisfactory, the Court enforced the agreement. In so deciding the Court used this significant language:

> "An agreement for a gift of land will not, of course, be enforced on proof alone of the promise to give. This is true whether the promise be oral or in writing. But where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the *faith of the promise which materially changes his condition,* the promisor will be required to make good the gift." (Emphasis supplied.)

The question will arise in the Court's mind at once: Was the removal from California to Seattle any greater change of condition than the removal of this aged woman from her comfortable home amidst her relatives and friends in Portland to Davenport?

In *Velikanje v. Dickman,* 98 Wash. 584, 596; 169

Pac. 465, 470, the part performance was a little more substantial. Decedent, an elderly man broken in health, offered to leave his ranch worth $25,000 to respondent, a young man of 23, if he would live with him and care for the ranch. The young man did care for him for a period of about 9 months while decedent was on the ranch in the period of a year and a half before decedent's death. By his last will decedent left this property to a nephew, making no mention in the will of respondent or of the ranch. While the services were for a short period the Court nevertheless enforced the obligation because the evidence was wholly satisfactory as to the making of the agreement. Again, the Supreme Court's language is significant:

> "Finally, it is argued that, in view of the short duration of respondent's services, they are inadequate as a consideration to sustain specific performance. But the extent of the consideration is to be measured by the breadth of the undertaking, rather than by the eventuality."

In *Alexander v. Lewes,* 104 Wash. 32, 42, 44, 46, 47; 175 Pac. 572, 576-7, decedent, a man in his 86th year, entered into an oral agreement with the husband of his recently deceased daughter that if the son-in-law would care for him until death of decedent he would leave certain property to him worth $12,000. At the time this oral agreement was made decedent drew his will which included this devise of the real estate to the son-in-law, reciting that he was greatly

indebted to him "for extreme kindness, care and attention," this because decedent had previously made his home with his son-in-law and the deceased daughter of decedent.

Decedent lived with his son-in-law only four days after making this oral agreement when he was taken away from the home by relatives with the result that there could be no further performance of the agreement by the son-in-law. A couple of days later decedent executed a new will leaving the property covered by the oral agreement to his surviving children. The trial judge refused relief, saying that:

> "Specific performance should not be enforced if it would be unconscionable or inequitable or work an injustice. To say to Alexander that he is now entitled to the $12,000, by reason of taking care of the old man for three or four days . . . it seems to me would be an entire injustice . . ."

But the Supreme Court reversed the case and granted specific performance.

It was urged by the defendants that a remembrance of past benefits plus only four days of part performance was wholly inadequate to admit oral evidence of the agreement and that plaintiff could be compensated in money for his small part performance. But the Supreme Court said:

> ". . . in the absence of fraud or overreaching, the testator, being competent, can fix upon anything that is not in itself unlawful as a consideration and put his own value upon it, whether it be greater or less . . .

> "It would be unseemly, to say the least, for us to hold the contract inequitable . . . when Frederick Lee Lewes found no inequity in his promise . . .
>
> "Courts will not ordinarily measure equities by time standards to aid one who breaks a contract . . . The case ordinarily presented is one where the promisee fails to perform. The question of substantial performance is then important. But this case rests not upon the failure of the promisee but upon the repudiation of his contract by the promisor."

We have quoted the text from this case both because the language is pertinent and because the facts have certain similarities. In both cases each decedent was in his 80's. Each man knew what he wanted and in each case the promisee did all that decedent required of him or her. Can it be said that when Catharina broke up her home in Portland, leaving behind her at the age of 76 her settled way of life, her relatives and friends and removed to Davenport, Washington, she did any less than this son-in-law with his four days' performance? Is the will in the Lewes case, in effect less than a week, any more potent evidence than the will of decedent in this case in effect through the remainder of the life of Catharina and then followed up some weeks after her death by a second will in favor of appellants?

Both cases are alike in that each decedent made the promise in good faith and with a definite intent to fulfill his promise but was later led, by considera-

tions or pressures not revealed by the testimony, to change his will, in our case long after the promisee had passed on to her reward in the full belief that her husband would fulfill his promise (Finding of Fact 10 and 14, R. 18 & 19).

In the Lewes case the equities that influenced the Supreme Court to give effect to the oral portion of the contract, as shown by the foregoing quotation, were created by the good faith intent of decedent to fulfill his bargain, evidenced by the will he drew at the time. Bearing in mind that the trial court in our case has found that decedent made this promise "for the purpose of inducing Catharina Schlaadt to marry him" and that "this proposition or promise was the *special inducement* that led this 76 year old woman in her comfortable circumstance to marry John Henry Kucks" (Findings of Fact 4 and 6, R. 16-17), we have here far stronger equities in favor of this wife and her children than existed in the Lewes case. Not only are the equities stronger, but the performance of the oral part of the contract between the parties is more complete on both sides.

In *Perkins v. Allen,* 133 Wash. 455; 233 Pac. 655, a $2600 estate was set aside as a homestead to the surviving husband. Plaintiffs, children of the deceased wife, quitclaimed their residuary interest in the estate to the husband and he promised at his death to leave it to them. He drew such a will but made a later will leaving his estate to defendants. In sustaining the oral contract to make a will the court said:

"Appellants also strenuously insist that there is no consideration shown for the alleged contract, contending that the release by respondents of any interest in their mother's estate, under the will or otherwise, was no consideration . . .

"We cannot agree with the above contention. Although the consideration may have been slight, it was sufficient to confirm D. L. Getty in the ownership and control of the entire estate, and the fact that he was getting a fee instead of a mere life estate was some additional consideration, and as we said in *Lewes* case, *supra,* the fact that the consideration was slight will not defeat the contract, since a person may contract to convey or devise his estate for any consideration which may seem to him sufficient, so long as it is valid consideration."

In *McCullough v. McCullough,* 153 Wash. 625; 280 Pac. 70, decedent, a wealthy woman, agreed with plaintiff's father, whose wife had recently died, that decedent and her husband would bring up plaintiff's 13 months old child, as their own, giving her the education and social advantages impossible to the bereaved father but easy to the wealth of decedent. In addition, at the death of decedent plaintiff was to receive by will the home of decedent and the sum of $50,000.

In training and education decedent gave plaintiff every advantage promised and some years after plaintiff came into the home of decedent a will was executed by decedent leaving $50,000 to plaintiff but making no mention of the residence. Some time before her death decedent executed a later will that

left nothing to plaintiff, although by later codicils plaintiff was given upwards of $12,000.

Since at the time of the oral contract the father of plaintiff had no longer a wife and was in meager circumstances, it seems clear that both he and plaintiff received substantial benefits, adequate to compensate them for allowing the plaintiff to be brought up by her grandaunt, so that the additional promise to leave money and house by will was at best a dubious additional circumstance that the court might have rejected because the performance of father and daughter could readily be referable to the education, support and cultural advantages gained by plaintiff by living with her grandaunt. But, as in the other cases cited above, the Supreme Court expressed no doubt as to the adequacy of performance, confining its inquiry to the question whether the plaintiff's proof of the oral contract was "conclusive, definite, certain . . . and established beyond all reasonable doubt." Finding the proof sufficient, it sustained the oral agreement.

To the same general effect:

Worden v. Worden, 96 Wash. 592, 165 Pac. 501;

Herren v. Herren, 118 Wash. 56, 203 Pac. 34;

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816;

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729;

Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984;

Resor v. Schaefer, 193 Wash. 91, 74 P. (2d) 917;

Luther v. National Bank of Commerce, 2 Wn. (2d) 470, 98 P. (2d) 667;

Cummings v. Sherman, 16 Wn. (2d) 88, 92; 132 P. (2d) 998;

Southwick v. Southwick, 34 Wn. (2d) 464, 208 P. (2d) 1187.

2. *Effect in Washington of Will Executed in Pursuance of Oral Contract*

(a) *Will as Part Performance.* Our Supreme Court has several times held that the mere making of a will, with no other act of performance by either promisor or promisee, is not sufficient part performance to allow testimony of an oral contract.

In *In re Edwall's Estate,* 75 Wash. 391, 402, 405; 134 Pac. 1041, 1045, 1046, a case of reciprocal wills, the Court expressed this thought in the following language:

> ". . . We are of the opinion that these wills do not *of themselves* prove the making of any contract of mutuality on the part of the testator . . ." (p. 402)
>
> ". . . We do not think that the *mere* making of a will in pursuance of a contract required to be evidenced in writing by the statute of frauds constitutes a part performance of such a contract so as to render the same enforceable . . ." (p. 405) (Emphasis ours.)

And in *McClanahan v. McClanahan,* 77 Wash. 138, 142-3; 137 Pac. 479, 480, and in *Cavanaugh v. Cavan-*

augh, 120 Wash. 487, 495; 207 Pac. 657, 659, in each of which cases there was no part performance unless the mere making of a will could be regarded as such part performance, the Court quoted the above language that the "will of itself," the "mere" making of a will, is not part performance.

In *Worden v. Worden,* 96 Wash. 592, 165 Pac. 501, 506, the Court, citing the *McClanahan* case, supra, again repeated this limiting clause, saying:

> "While . . . the execution of a will is not sufficient *in itself* as part performance . . ., still we think the will is admissible in support of other evidence to establish the contract . . ." (p. 606) (Emphasis supplied.)

This careful repetition each time of the words "not sufficient in itself" etc. is significant, especially when we see the acceptance of the will for part performance when there is any other evidence thereof, however slight.

On the other hand, where there is other evidence of part performance in addition to the execution of a will, the Washington Supreme Court accepts the execution of a will, though later revoked, as itself a part of the performance of the oral contract. An excellent illustration of this aspect of the rule is found in *Swingley v. Daniels,* 123 Wash. 409, 416-7; 212 Pac. 729, 731, where it was said:

> "This court has many times held that an oral contract such as is here involved, while within the statute of frauds, is taken therefrom by a

> performance of the agreement. Here, there was a *complete* performance by the actual transfer of the lands in question and by the making of the *first* will by Mr. Boyce." (Emphasis ours.)

Manifestly, the Court could not recognize the making of the revoked will as *completing* the performance of the oral contract without accepting that revoked will as a *part* of the performance.

The same facts (where the Court takes into account decedent's execution of a will as part of full performance) exist in *In re Fischer's Estate,* 196 Wash. 41, 52; 81 P. (2d) 836, 840, discussed later in this brief at IV,B,3, "Full Performance of Marriage Contracts."

(b) *Will as Confirmatory Evidence.* In reviewing these cases of specific performance of such oral contracts the Washington Supreme Court in *Jennings v. d'Hooge,* supra, (25 Wn. (2d) 702, 711; 172 P. (2d) 189, 194) said of *Olsen v. Hoag,* 128 Wash. 8; 221 Pac. 984:

> "This court considered the evidence of the various witnesses but based its decision *very largely* upon the fact that the first will was made leaving the property to the appellant and *therefrom* held that the contract was an enforceable one." (Emphasis ours.)

Again, in the *Jennings v. d'Hooge* case, on the same page reviewing *Perkins v. Allen,* 133 Wash. 455, 234 Pac. 25, the Court observed:

> "Again the court based its decision largely upon the fact that a will had been made which

> was similar to the terms of the alleged contract even though the subsequent will changed the name of the beneficiary."

Yet again the *d'Hooge* opinion, at the same point, reviewing *McCullough v. McCullough,* supra (153 Wash. 625, 280 Pac. 70), comments:

> "The court in deciding the case based its decision *to a large extent* on the fact that the deceased had indicated and approved the terms of the contract by the making of the first will." (Emphasis ours.)

We invite the Court's attention to three other cases which, while not bearing on part performance, do indicate the importance the Washington Supreme Court attaches to a will executed by the promisor in pursuance of his oral agreement.

Worden v. Worden, supra (96 Wash. 592, 605; 165 Pac. 501, 506), uses the following language:

> "The will itself is strong confirmatory proof that such an agreement was entered into . . . Here the will as actually made fully corroborates the other evidence."

In *Perkins v. Allen,* supra (133 Wash. 455, 459; 234 Pac. 25, 27), speaking of a revoked will of decedent, the Court said:

> "Although not conclusive, it [the revoked will] also is corroborative of the contract itself and of its terms."

And in the late case of *Ellis v. Wadleigh,* 27 Wn. (2d) 941, 948; 182 P. (2d) 49, 53, it is noted that:

> "Proof that a will actually had been executed has been a *most important factor* in cases of this character," (Emphasis ours.)

quoting the above language from *Worden v. Worden,* supra, and citing *Olsen v. Hoag,* supra.

These cases lead us directly to the doctrine of full performance.

3. *Full performance*

(a) *The General Rule.* The rule is so well established that the statute of frauds is inapplicable to contracts which have been fully performed that we open this part of our brief by a quotation of the text from 37 Corpus Juris Secundum 738 (Statute of Frauds, section 235):

> "It is well settled that the statute of frauds applies *only* to executory contracts, and not to those which have been executed and performed completely on both sides; in such cases the rights, duties and obligations of the parties are entirely unaffected by the statute." (Emphasis ours.)

As we have seen in *Swingley v. Daniels,* supra (123 Wash. 409, 417; 212 Pac. 729, 731) this text finds support in the decisions of the Supreme Court of Washington, where not only full performance but part performance of an oral contract, which would otherwise be under the statute of frauds, is treated as taking the contract out of the ambit of the statute.

Thus, in *Worden v. Worden,* 96 Wash. 592, 608-9; 165 Pac. 501, 507, it was said:

> "The facts in this case show full performance on the part of the appellants and *attempted full performance* on the part of the decedent by the execution of the will agreed upon, although such instrument proved to be void through failure to conform to statutory requirements. . . . The law is well settled that the heirs can be compelled to specifically perform the contract of their ancestor . . ." (Emphasis ours.)

McCullough v. McCullough, 153 Wash. 625, 631; 280 Pac. 70, 72, dealt with full performance by the promisee only. The law was thus stated:

> "An oral contract to make a will, which has been *fully performed* by the person seeking to enforce it, may be enforced in equity as against the heirs, devisees or personal representatives of the deceased." (Emphasis ours.)

In *Herren v. Herren,* 118 Wash. 56, 71; 203 Pac. 34, 39, the Court found:

> ". . . the evidence brings this case within the rule that a parol agreement for the conveyance of real property will be enforced where it has been *fully performed* by the promisee."

In *Slavin v. Ackman,* 119 Wash. 48, 51; 204 Pac. 816, 818, the Court, granting specific performance of an oral agreement to give or devise real property, placed specific performance on the ground that:

> "All of the testimony shows that the contract was *completely performed* by respondent." (Emphasis ours.)

The latest case on this subject is *Southwick v. Southwick,* 34 Wn. (2d) 464, 474; 208 P. (2d) 1187,

1193. There the Washington Supreme Court, referring to the effect of partial or full performance, observes:

> "In the case of Jennings v. d'Hooge, *supra,* [25 Wn. (2d) 702, 172 P. (2d) 189] this court said . . . 'This court has held that the above statutes [statutes of frauds] *do not apply* in instances in which oral contracts are made to convey property by will *and the consideration has been fully paid'.*" (Emphasis ours.)

In re Fischer's Estate, 196 Wash. 41, 47; 81 P. (2d) 836, 838-9, uses this language:

> "Contracts to devise or bequeath property, although not favored in law, are nevertheless enforceable, if the terms of the contract, the intention of the parties, and the adequacy of consideration are established to the satisfaction of the court by the degree of proof required, and no fraud, overreaching, or other inequitable circumstances of controlling effect is shown. *Velikanje v. Dickman,* 98 Wash. 584, 168 Pac. 465; *Alexander v. Lewes,* 104 Wash. 32, 175 Pac. 572; *Andrews v. Andrews,* 116 Wash. 513, 199 Pac. 981; *Olsen v. Hoag,* 128 Wash. 8, 221 Pac. 984; *Perkins v. Allen,* 133 Wash. 455, 234 Pac. 25; *Avenetti v. Brown,* 158 Wash. 517, 291 Pac. 469; *Resor v. Schaefer,* 193 Wash. 91, 74 P. (2d) 917; *Wayman v. Miller,* 195 Wash. 457, 81 P. (2d) 501."

The opinion in *Luther v. National Bank of Commerce,* 2 Wn. (2d) 470, 480; 98 P. (2d) 667, observes:

> "The rule is definitely settled in this state that oral contracts of the character here in question, are enforceable notwithstanding the statute of frauds, if there has been either *full or part per-*

formance. Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981; *In re Fischer's Estate,* 196 Wash. 41, 81 P. (2d) 836." (Emphasis supplied.)

(b) *Applicable to Marriage Contracts.* That the general rule as above stated relating to full performance is equally applicable to contracts in consideration of marriage is shown by the following quotation from 37 Corpus Juris Secundum 739:

> "Oral contracts made in consideration of marriage which have been completely executed by the parties are not affected by the statute of frauds, and the executed transaction cannot be disturbed on the ground that there is no writing. A transaction of this nature is executed when everything undertaken by the promisor in the antenuptial contract has been performed."

In the decisions of the Washington Supreme Court we have two cases involving marriage contracts. In the first of these, *In re Fischer's Estate,* 196 Wash. 41, 43, 52; 81 P. (2d) 836, 837, 840, at or before the marriage the Fischers

> "had agreed to live together as husband and wife, . . . to pool their separate properties and hold them as community property and to make mutual and reciprocal wills whereby the survivor should take and receive the entire property."

The husband had assets valued at about $1,500 and the wife had about $700 cash which after their marriage they did hold as community property. They were thrifty and in the next 20 years of their marriage they accumulated property valued at the death of

the wife at $8,050. Less than a month after their marriage, pursuant to their earlier oral agreement, husband and wife executed the reciprocal wills in favor of each other. But 12 years later the wife executed a will in favor of her sister.

Apart from the making of the wills, the only part performance of the oral agreement was the pooling of their respective assets of which the husband had $800 more than his wife. The most that can be claimed for this is that the husband "lost" one half of his excess, or $400, by this pooling. But as the husband under Washington community property law is the manager of community personal property (Sec. 26.16.03 Revised Code of Wash.; Sec. 6892 Rem. Rev. Stat.), this really meant that he had the wife's $700 of cash as well as his own property to manage, spend or invest. This pooling of assets as community property as between a beginning husband and wife, particularly when the amount is so small as the Fischers', is an invariable incident of marriages that run for 20 years and, as part performance, is certainly no more impressive than Catharina's action in breaking up her home and removing with her household furnishings to her husband's home. Thus, the language of the Washington Court in the case is especially apt. It said:

> "As to the effect of the statute of frauds, we need only state what has already been suggested by the remarks of the trial court; there was full and adequate performance of the contract by the respondent, sufficient to take it without the

> restrictions of the statute. Moreover, there was, initially, full and adequate performance by Mrs. Fischer herself, and she could not thereafter recede from the contract, even if she had desired to do so."

This again illustrates the view of the Washington Supreme Court when there is performance on both sides of the oral contract. The will, later revoked by one of the parties, is taken into account as part of full performance. The trial court inclined to the view that Catharina's giving up her established comfortable and happy home and way of life and moving with all her belongings to her husband's home was what a wife would naturally do, therefore could not be looked upon as any part of the performance of the oral contract. But assuredly the pooling of the small savings of the Fischers is just as natural and incidental to marriage as the action of Catharina.

In *Luther v. National Bank of Commerce,* 2 Wn. (2d) 470, 479, 484; 98 P. (2d) 667, 672, 673, decedent, a man of 65 suffering from angina and hardening of the arteries, orally assured plaintiff, an experienced nurse and housekeeper of 56 who made her living by operating her own hospital, that if she would give up her hospital and nursing and care for him for the rest of his life he would devise and bequeath his estate to her. Plaintiff, accepting the proposal, did dispose of her hospital and six days later married decedent at his suggestion. The court found (p. 475) that "there was no romance con-

nected with the marriage" just as in our case the court found (Finding of Fact 6, R. 17) that "This 76 year old woman would not have married him [Kucks] but for such promise" to leave his estate to her sons. Luther made no will in favor of plaintiff (except that he left her furniture worth $100 out of a $20,000 estate) and thus the Luther case is distinctly weaker than the case at bar.

Defendant urged (p. 478) that the acts of part performance were "as readily and logically referable to the marriage contract as to the contract for care and nursing" and invoked (pp. 478-9)

> "the general rule that when *part performance* is relied upon for specific *enforcement* of a contract every act of *such performance* . . . must be unequivocably and ordinarily exclusively referable to the contract . . . 58 C. J. 994, sec. 190." (Emphasis by the court.)

The Supreme Court answered this argument by admitting the premise but denying the applicability of the rule. It said at pages 479-80:

> "There is no occasion here to invoke that portion of the rule above stated which requires that the act performed 'must of itself give rise to an *inference* of the existence of the contract' because here the 'existence of the contract' was fully established by the evidence." (Emphasis by the court.)

This exception to the general rule, as stated by our Supreme Court, was definitely overlooked by the learned trial judge in this case when he declared in

his opinion that "everything else that she [Catharina] did was purely incidental to the marriage" (R. 150). So reasoned the defendant in the Luther case, only to be overruled by the Washington Supreme Court because the existence of the contract, there as here, "was fully established by the evidence."

And when defendant in the Luther case adopted from another decision the argument (p. 487) that "giving up her erstwhile employment was but an incident to the proper discharge of her duties under the contract" the Supreme Court replied (p. 487) that in so doing plaintiff had "changed the whole current of her life." This language is peculiarly applicable to the action of Catharina in breaking up her comfortable home where she had lived for a quarter of a century, in leaving behind her three generations of lineal descendents and all of her old friends, so especially valued by the aged.

Another aspect of the Luther case was likewise overlooked by the trial judge. The Washington Court said at page 484:

> "We think that another rule applicable to the facts of this case is that found in Restatement of the Law of Contracts, 110, sec. 90, as follows:
>
> " 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

> "It seems to us that it would be a gross injustice to deny respondent the benefit of her bargain, which she performed to the letter, merely because by operation of law the services which she rendered subsequent to marriage are held to be without consideration."

This quotation from the Restatement of the Law is especially applicable to this case, for every element present in the foregoing quotation is equally well established by the findings of the trial judge. Here, too, it would be a gross injustice to Catharina and her sons to deny them the benefit of the promise that induced her to marry Kucks when she had made such a sacrifice alike of her comfort and of her association with her family and friends to achieve that benefit.

4. *Statute of Frauds Cannot be Used to Perpetrate Fraud*

Since the trial judge found in such emphatic terms that this oral contract was entered into in good faith by both parties and that the making of this oral contract is further corroborated by the execution of the two wills by John Henry Kucks and since it is also incontestably established that the oral contract has been fully performed, it is manifest that to deny relief to appellants is to use the statute of frauds for the purpose of defrauding these appellants of what had been solemnly promised to their mother. Not only the appellants but Catharina herself, who gave up the last period of her life to live away from all of those dear to her in order to earn

this estate for her children, is as completely defrauded by the use of the statute of frauds as a defense as if Kucks himself had originally intended to defraud her and had coldbloodedly made this promise never intending to keep it.

In a late case, *Mobley v. Harkins,* 14 Wn. (2d) 276, 283, 128 P. (2d) 289, 292, our Supreme Court has given its full recognition to this well established rule in the following terms:

> "The English statute of frauds was originally enacted to prevent fraud and perjury by requiring that certain enumerated agreements and conveyances be in writing. But it was soon found that the indiscriminate application of this statutory rule often had the contrary effect of actually furthering the perpetration of fraud. The courts of equity therefore developed the doctrine of equitable estoppel by reason of part performance, declaring that certain acts referable to an oral agreement would be regarded as taking that agreement out of the statute of frauds. In this way equity guards against the utilization of the statute as a means for defrauding innocent parties who have been induced or permitted to change their position, in reliance upon oral agreements within its operation. See, generally, note (1936) 101 A.L.R. 923, 935 ff., wherein the case of *Mudgett v. Clay,* 5 Wash. 103, 31 Pac. 424, is cited."

That this has always been the rule of the Supreme Court of Washington is established by the early case of *Mudgett v. Clay,* above cited, where the Washington Supreme Court said:

> ". . . Courts of equity take cognizance of cases for specific performance of verbal agreements to convey real estate, by virtue of their general jurisdiction to relieve against frauds. They exercise their jurisdiction in such cases in order to prevent a party from escaping from the obligation of his agreement, on the plea of the statute of frauds, after the other party to the contract has, in good faith, proceeded so far in the execution of the agreement, that it would be a fraud upon him to give effect to the statute . . ."

We respectfully suggest that this is as clear a case as can be found for the application of the rule that the statute of frauds cannot be used to give validity to a defense that would perpetrate a fraud.

5. *Cases Relied on by the Trial Court*

In view of the trial judge's completely favorable findings and the pertinence of the Washington cases cited herein, this brief might well close at this point. But our respect for the learned and conscientious trial judge is such that we are constrained to deal with the two cases from other states, turned up by his industry, which in our view led him astray.

In *Aiken v. English,* 289 Pac. 464 (Kansas), a stepson sued his stepfather's estate for one-half interest therein, claiming an oral agreement with his stepfather that if his mother would marry decedent and if the stepson, then 8 years old, "would give him [decedent] his love, companionship and affection" the decedent would leave one-half his estate to the stepson. At no time did the stepfather make a will

in favor of the stepson, but he did support the stepson until the stepfather's death, when the stepson was 18 years old. Thus there was nothing done on either side by way of part performance, since the marriage, *standing by itself,* could not be taken as part performance of an oral contract with which it was in nowise connected. The Kansas court refers skeptically to "this precocious plaintiff's consent to his mother's marriage" and concluded its opinion by holding "that the oral contract relied on by plaintiff lacked a valid and sufficient consideration for its support."

But even if this case had been in point the Kansas court's reference to the general rule of that state shows the danger of using cases from other jurisdictions without ascertaining that such decisions are in harmony with the law of Washington. The Kansas court, quoting from an earlier Kansas case, said (p. 466):

> "The general rule is that every parol contract concerning lands is within the statute of frauds and perjuries and unenforceable except where the performance *cannot be compensated* in damages. The fact that the consideration for the contract was to be paid in services and not in money makes no difference in the application of the rule." (Emphasis ours.)

That this is a far narrower and more rigid rule of exclusion of oral contracts than obtains in Washington is demonstrated by the following cases, in

all of which plaintiff could have been compensated in damages for much less than was recovered by specific performance:

Worden v. Worden, 96 Wash. 592, 165 Pac. 501;

Coleman v. Larson, 49 Wash. 321, 95 Pac. 262;

Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465;

Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572;

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816;

Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984;

Perkins v. Allen, 133 Wash. 455, 234 Pac. 25;

Resor v. Schaefer, 193 Wash. 91, 74 P. (2d) 917;

Southwick v. Southwick, 34 Wn. (2d) 464, 208 P. (2d) 1187.

In the other case cited by the trial judge, *Hutnak v. Hutnak,* 81 A (2d) 278 (R. I.), a young woman was courted and married in Europe, in connection with which she was promised that she would be a "partner" of her husband sharing equally with him in their accumulations in this country. Accordingly, after their marriage she came from Europe with him, as scores of thousands of young women have eagerly done in recent years without any inducement other than marriage. Some years later the husband sued her for a legal separation and she countered

with her suit for specific performance. In denying relief the court held that

> "The marriage here was the main if not the sole object of the agreement. Whatever else is alleged in the bill . . . is also so indefinite and marked with such futurity as to furnish no substantial basis for equitable estoppel."

It would be superfluous to comment on the irrelevance of the Hutnak case to the case at bar.

Even if these two cases had been much closer than they are to the case at bar, they could not be relied on, coming as they do from Kansas and Rhode Island, to support the judgment of the trial judge in view of the scope of the Washington decisions here considered.

In his oral opinion, answering appellants' argument that this oral contract had been fully performed and speaking of the two wills executed by Henry Kucks in performance of his oral contract, the trial judge said (R. 148):

> "The will in which he [Kucks] left property to the two sons of Mrs. Schlaadt was only an *ambulatory* temporary arrangement which could be changed at will, and was changed later on . . . We haven't got it [performance] when he merely makes a will which is only ambulatory." (Emphasis ours.)

This overemphasis on the ambulatory nature of the will begs the question. Where the decedent has agreed to make a certain kind of will and does so,

then, although he may indeed revoke the will, he is nevertheless bound by the terms of his contract and his subsequent change of his will can have no effect. The Supreme Court of Washington has made this distinction in at least two cases.

In *Olsen v. Hoag,* supra, (128 Wash. 8, 14; 221 Pac. 984, 986) answering just such an argument as the trial judge here has made, the Court said:

> "Of course, this was a mere will and revocable at pleasure, and it was revoked by the execution of the subsequent will; yet the subsequent will could do no more than any other alienation of property, and if the property was subject to an enforceable trust, it also *could have no effect.*" (Emphasis ours.)

And the Washington Court made the same reply to the same argument in almost exactly the same words in *Perkins v. Allen,* supra, (133 Wash. 455, 459; 234 Pac. 25, 26).

V

CONCLUSION

In conclusion, we suggest that Washington decisions establish the following legal principles controlling here:

1. The Washington Supreme Court has established a most exacting rule as to the quantum of evidence necessary to establish an oral contract within the prohibition of the statute of frauds. The trial court

expressly found appellants' case fully complies with this requirement.

2. Because the Supreme Court of Washington has been so strict as to the quantum of proof of the contract, its decisions have laid much less stress upon the quantum of part performance and repeatedly have liberally accepted less evidence of part performance than is shown in this case.

3. The Supreme Court of Washington has explicitly adopted the rule laid down by the Restatement of the Law that an oral promise intended, as was Kucks', to induce action and which does induce such action is binding if justice requires that it be enforced, as do the equities in this case.

4. Our Supreme Court has accepted the principle that where a will has been executed in conformity with the terms of the oral contract and the promisee has entered upon performance of that oral contract, the execution of the will is not only potent evidence of the making of the oral contract but itself becomes a part of the performance thereof which takes the oral contract out of the prohibition of the statute of frauds.

5. Our Court has also adopted the principle, directly applicable here, that the Statute of Frauds is designed to prevent fraud, not to promote it by an "indiscriminate application" which defrauds those "who have been induced to change their position in reliance upon oral agreements within its operation."

6. And, finally, most conclusive of all, when such an oral contract has been fully performed on both sides, as we have found is the case here, the statute of frauds has no application to such contract.

We respectfully submit that the facts found by the trial judge clearly bring this case within the scope of these basic principles and require a reversal of the trial judge's judgment.

Respectfully submitted,

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APPENDIX 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact (R. 15-20)

1. At all times mentioned in these findings plaintiff Grover C. Schlaadt, Sr., was and is a citizen and resident of the state of Oregon and plaintiff Garfield Schlaadt was and is a citizen and resident of the state of California. At all times in these findings mentioned all of the defendants in this cause were and are citizens and residents of the state of Washington.

2. The amount in controversy in this litigation exceeds, exclusive of interest or costs, the sum of $3,000.

3. Catharina Schlaadt (after August 11, 1944, Catharina Schlaadt Kucks) was the mother of the plaintiffs herein. In the month of June, 1944, Catharina Schlaadt was a widow living in the city of Portland, Oregon. She had been a widow for ten years and lived in a large and well furnished home of her own built by her late husband for them in 1920. Her son Grover C. Schlaadt, Sr., lived on a farm 14 miles away but came into the city each day to work and two or three times each week brought with him his wife to spend the day with Catharina Schlaadt, then picking her up in the evening. In Portland lived her grandson Grover C. Schlaadt, Jr., his wife and Catharina Schlaadt's great grandson. In addition, she had a wide circle of friends and was happily circumstanced both as to relationships and as to living conditions.

4. For many years there had been an acquaintanceship or friendship between John Henry Kucks and his wife Ida Kucks, living at Davenport, Washington, and the Schlaadt family as herein described.

In the month of June, 1944, John Henry Kucks, having recently become a widower through the death of his wife, visited Catharina Schlaadt at her home in Portland and there orally made her the proposithat if she would marry him he would leave upon his death all of his estate to her two sons Grover C. Schlaadt, Sr., and Garfield Schlaadt. Said proposition was made by him for the purpose of inducing Catharina Schlaadt to marry him. This promise was made by John Henry Kucks in good faith and without intent to defraud or deceive Mrs. Schlaadt.

5. The evidence adduced on behalf of the plaintiff as to the making of this oral proposition or promise by John Henry Kucks to Catharina Schlaadt that if she would marry him he would leave the whole of his estate to her two sons Grover C. and Garfield Schlaadt is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein.

6. The court finds that this proposition or promise was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise. However, while the evidence is silent as to the purpose of John Henry Kucks, it is reasonably inferable that he entered into the marriage with the usual expectations entertained of marriage by a man of his age, hoping to have a wife to make and keep a home for him and to give him her care and companionship.

7. Thereafter, having weighed the advantages and benefits to her sons of the promise so made by John Henry Kucks to leave all of his property and estate to her two sons, and in consideration thereof, Catharina Schlaadt agreed and promised to marry

John Henry Kucks and on August 11, 1944, John Henry Kucks and Catharina Schlaadt were married at Vancouver, Washington.

8. Relying on said promise of John Henry Kucks to leave his estate as aforesaid Catharina Schlaadt Kucks removed her personal belongings, including her furniture, dishes, and clothing, from her home at Portland, Oregon, to the home of John Henry Kucks at Davenport, Washington, and thereafter until her death Catharina Schlaadt Kucks resided at his home at Davenport, Washington, and was a dutiful wife to John Henry Kucks.

9. Thereafter on May 24, 1945, John Henry Kucks made and executed his last will by which he left all of his property and estate to his "beloved wife, Catharina Kucks," and appointed Catharina Kucks to be the executrix of his last will under the terms of a non-intervention will.

10. On January 4, 1946, Catharina Schlaadt Kucks died intestate, leaving as her only heirs at law plaintiffs and a daughter Florence Schlaadt, all issue of a former marriage, and her husband John Henry Kucks probated her estate and succeeded to all of her property rights in the state of Washington.

11. Thereafter on February 11, 1946, the said John Henry Kucks by his last will bequeathed in trust the sum of $500 to Gary Handel (son of George Handel whom he and his wife Ida Kucks had brought up to manhood) with the provision that if he should die prior to reaching 21 years of age then the trustee should pay the amount thereof to the beneficiaries of his residuary estate. All the rest, residue and remainder of his estate by said last will John Henry Kucks gave, devised and bequeathed unto Grover C. Schlaadt an undivided 2/3 interest and unto Garfield Schlaadt an undivided 1/3 interest, stating that the said beneficiaries were the sons of his deceased wife Catharina Kucks. Furthermore, Grover C.

Schlaadt, one of the plaintiffs herein, was made executor of said last will under the terms of a non-intervention will under the laws of the state of Washington.

12. Thereafter on October 22, 1946, John Henry Kucks, then being of the age of 84 years, made another will by which the whole of his estate was divided 1/3 to Garfield Schlaadt, 1/6 to Grover C. Schlaadt, 1/6 to the defendants Fred Jahnke and Emma Jahnke, husband and wife, and 1/3 to defendants Emil Zimmerman and Kate Zimmerman, husband and wife, and further appointed Emil Zimmerman as executor of his estate under the terms of a non-intervention will under the laws of the state of Washington.

13. Thereafter, on March 2, 1948, John Henry Kucks made and executed yet another will by which he bequeathed the balance of any money due him on his death from the sale of his land in Canada, which amounted approximately to $15,000, to George Handel, whom he and his wife had brought up to manhood, and to Jerry Handel, infant son of George Handel, he bequeathed a Canadian liberty bond in the amount of $1,000. All the rest, residue and remainder of his estate John Henry Kucks gave, devised and bequeathed an undivided 1/2 interest to defendants Fred Jahnke and Emma Jahnke, husband and wife; an undivided 1/2 interest to Emil Zimmerman and Kate Zimmerman, husband and wife, and appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

14. Thereafter on August 27, 1949, John Henry Kucks executed his fifth will by which he gave, devised and bequeathed the whole of his estate 1/2 thereof to defendants Emil Zimmerman and Kate Zimmerman and 1/2 thereof to defendants Fred Jahnke and Emma Jahnke. By said will also he

appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

15. Thereafter on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereupon such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed as above recited on August 27, 1949, was duly admitted to probate in the superior court of the state of Washington for Lincoln County. Defendant Emil Zimmerman received letters testamentary from the said court authorizing him to act as executor of said last will and ever since said date defendant Emil Zimmerman has been and is the duly appointed, acting and qualified executor of the estate of John Henry Kucks, deceased.

16. Thereafter such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks, deceased, was duly filed in the office of the clerk of the said court and property therein listed was duly appraised as of the value of $74,552.22. The major portion of the property so inventoried and appraised consisted of real estate. The balance of approximately $15,000 due from the sale of the land in Canada was not included in said inventory.

From the foregoing findings of fact the court draws its conclusions of law:

Conclusions of Law (R. 21)

I

That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the state

of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

II

That defendants are entitled to judgment against the plaintiffs dismissing the above-entitled action with prejudice together with their costs of suit.

Dated at Spokane, Washington, this 8th day of August, 1952.

/s/ SAM M. DRIVER,
District Judge.

[Endorsed]: Filed August 8, 1952.

APPENDIX 2

Requisites of Wills

Revised Code of Washington, 11.12.020:

Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator or testatrix by his or her direction or request. . . .

Statute of Frauds

Revised Code of Washington, 19.36.010:

In the following cases any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be

charged therewith, or by some person thereunto by him lawfully authorized:

(1) Every agreement that by its terms is not to be performed in one year from the making thereof;

(2) Every special promise to answer for the debt, default, or misdoings of another person;

(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(4) Every special promise made by an executor or administrator to answer damages out of his own estate;

(5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

Revised Code of Washington, 19.36.020:

All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.